



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

LEGISLATIVE PROPOSAL (T&E-2007-05) *ARBITRABILITY OF CASES UNDER EADACPA*

To: State Bar Office of Governmental Affairs

From: Tracy Potts, Chair, Executive Committee
Shirley L. Kovar, Member, Executive Committee, and Chair, Litigation Committee
Edward J. Corey, Jr., Member, Executive Committee
Trusts and Estates Section, State Bar of California

Re: Draft of Legislative Proposal for Creation of a New Section of the Welfare and Institutions Code [Welfare and Institutions Code §15657.4] Regarding Arbitrability of Cases under EADACPA.
Project No. 2006-5

Date of Approval:

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Digest:

The proposed legislation would amend the Elder Abuse and Dependent Adult Civil Protection Act ("EADACPA"), Welfare and Institutions Code section 15600 et. seq., to provide that no claim brought under EADACPA would be subject to the provisions of an arbitration agreement, unless it meets the five minimum requirements as set forth by the California Supreme Court in *Armendariz v. Foundation Health Psychcare Services, Inc.*, or the arbitration agreement is entered into post-dispute.

In 1991, through Senate Bill 679 (which added, among other things, the attorney fees provision of EADACPA), the Legislature declared that "elderly persons and dependent adults are a disadvantaged class" (Welfare and Institutions Code §15600(h)) which is in need of special

protection. The Legislature specifically declared that, by adding §15657 to the Welfare and Institutions Code, it intended to “enable interested persons to engage attorneys to take up the cause of abused elderly persons.” (Welfare and Institutions Code §15600(j).) In addition to the attorney’s fees provision, SB 679 also gave the victim’s estate the right to punitive damages by removing the limitation on recovery after the death of the victim. These two provisions of SB 679 removed any disincentive attorneys had in pursuing elder abuse claims.

By adding §15657 to the Welfare and Institutions Code, the Legislature created additional rights and remedies for elderly persons and dependent adults that are not otherwise available under the law. Elderly persons and dependent adults should not be required to waive those rights, which would be the effect of most existing arbitration agreements. This proposed legislation aligns with the Legislature’s intent by protecting this disadvantaged class from unfair and unconscionable arbitration agreements.

Purpose:

The broad goal of EADACPA is stated in §15600 of the Welfare and Institutions Code which states, in pertinent part, that the Legislature recognizes that elders and dependent adults “constitute a significant and identifiable segment of the population” that is “more subject to risks of abuse, neglect, and abandonment;” and that “infirm elderly persons and dependent adults are a disadvantaged class”^a (emphasis added). The public policy against elder abuse is one that inures to the benefit of the public at large rather than to a particular elder or adult. Civil Code §3513 provides that “anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement”^b (emphasis added). Therefore, the statutory rights and remedies created under EADACPA are unwaivable. Additionally, arbitration agreements prohibit recovery of enhanced remedies created specifically for seniors. For example, Welfare and Institutions Code §15657.5 grants attorney fees and costs to elderly victims of financial abuse; Civil Code §3345 awards treble damages for unfair and deceptive practices perpetrated against seniors; Civil Code §3294 allows for exemplary damages; and Probate Code §859 redresses wrongful takings by awarding double damages.

The rights and remedies created under EADACPA are analogous to the rights and remedies created under the Fair Employment and Housing Act (“FEHA”). Both statutes were created for a public reason. EADACPA was created to protect all elders from physical abuse, financial abuse, and neglect. FEHA was created to protect all employees from sex discrimination and sexual harassment in the workplace. In 2000, the California Supreme Court held that the rights and remedies created by FEHA cannot be waived because FEHA was created for a public reason.^c The Court also held that any arbitration agreement which encompasses FEHA claims must meet certain minimum requirements in order for it to be enforceable.

The proposed legislation adopts the California Supreme Court’s rationale and applies it expressly to arbitration agreements within an elderly abuse context. Under these minimum

^a California Welfare and Institutions Code § 15600 et. seq.

^b California Civil Code § 3513

^c *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000).

requirements, an arbitration agreement would only be valid if: the arbitration agreement: (1) provides for neutral arbitrators that are selected by agreement of the parties; (2) provides for discovery under Code of Civil Procedure §2016.010 et seq; (3) requires a written award; (4) there is no prohibition as to the type of damages recoverable; and (5) does not require elders to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum. The proposed legislation will further these aims by ensuring that these individuals do not unknowingly waive their rights in cases of fraud and abuse by entering into arbitration agreements.

Illustration:

1. An elderly man entrusted all of his retirement savings, which was held in a trust, to a financial advisor at a local brokerage firm. As a requirement to opening the account, the elderly man executed documents containing an arbitration agreement. The arbitration agreement, unbeknownst to him, took away rights that are guaranteed under law. The arbitration agreement forced the elderly man to waive his right to seek remedies in court. For example, the elderly man waived his right to enhanced remedies specifically created for elderly and dependent adult victims of, among other types, financial abuse. These include the right to attorney fees under Welfare and Institutions Code §15657.5, post death damages for pain and suffering (Welfare and Institutions Code §15657.5(b)), punitive damages (Civil Code §3294), treble damages for unfair and deceptive practices against seniors (Civil Code §3345) and double damages under Probate Code §859. Moreover, the arbitration agreement had extensive up front out of pocket costs the senior has to expend to proceed with the arbitration, and the senior would be required to bear at least one-half the daily costs and expenses of the panel of arbitrators. The agreement also significantly limited discovery compared to traditional court proceedings. Additionally, the arbitration agreement would not require the arbitrator's award to include factual findings or legal reasoning. Finally, the arbitration agreement required some of the arbitrators to be affiliated with the securities industry. In order for the elderly man to understand the legal significance of signing the arbitration provision, he would need to know and comprehend the Code of Arbitration Procedure and, in this case, the NYSE Rules. Despite his confusion, by opening brokerage investment accounts, the elderly man unwittingly consented to arbitration. When the broker misappropriated the assets and depleted the elderly individual's funds, the elderly man was subject to the arbitration agreement he signed. Under *Armendariz*, the Sacramento County Superior Court ruled that the elder abuse action was not subject to the arbitration agreement because it failed to meet the five minimum requirements. Under the proposed law, the arbitration agreement would be void ab initio if it did not meet the five minimum standards set forth under *Armendariz* required to protect the public purpose of EADACPA. These standards would allow seniors to be fully protected as provided by law.

2. An elderly woman who signed an arbitration agreement in order to open several investment accounts brings suit against her broker for fraud, elder abuse, and breach of fiduciary duty. Although the plaintiff claims that the elderly woman suffered from Alzheimer's disease when she signed the arbitration agreements, the court needs proof that the woman lacked capacity to form the contract to void the arbitration agreement. Under the proposed law, the capacity issue is irrelevant because the arbitration agreement would be enforceable only if it met

the five minimum standards as set forth in *Armendariz*. These minimum standards will ensure that the elderly victim is fully protected under the law.

3. A man in his nineties sues his broker for churning his account and losing over \$2 million. The elderly man was forced to sign an arbitration agreement to open up several accounts. On two of these accounts the arbitration agreements were missing. Despite the missing documents, the court held that all the claims should be settled in arbitration. Under current law, interpretation of an arbitration clause is interpreted in favor of arbitration regardless of the parties. California has a strong public policy in favor of arbitration. The public policy regarding arbitration is directly contrary to the public policy concerning the protection of seniors as well as contrary to the current law which establishes certain rights and remedies for elderly and dependent adults who are victims of abuse. Under the proposed law, public policy concerns protecting elders and dependent adults from abuse is tantamount. Any arbitration clause will only be enforced if it meets the minimum standards as set forth by the California Supreme Court.

Documentation:

The California Legislature has declared that nearly 225,000 Californians are victims of elder and dependent adult abuse every year, including neglect and physical, psychological, emotional, and financial abuse; and that victimization levels are likely to increase. [ACR 8 (Dymally), January 14, 2005]. The United States Census Bureau projects that California's elderly population will nearly double in the next 20 years, from 3.7 million to 6.4 million. See Office of the Attorney General, State of California Department of Justice, *Elder Abuse in California*. See also California Assembly Committee on Public Safety, Committee Analysis of SB 2199 (June 23, 1998). The Subcommittee on Health & Long-Term Care of the House Select Committee on Aging, 101st Congress, in its report, *Elder Abuse: A Decade of Sham and Inaction*, XI (Comm. Print 1990), estimated that more than 1.5 million persons may be victims of abuse each year. This is a marked increase of the numbers reported in a landmark 1981 report, *Elder Abuse: An Examination of a Hidden Problem*, Subcommittee on Health & Long-Term Care of the House Select Committee on Aging, 94th Congress, which reported that four percent of the American aged, roughly 1,000,000 persons, might be victims of elder abuse. The Department of Social Services concluded that only one in five cases of elder and dependent adult abuse is reported. *Elder and Dependent Adult Abuse: Analysis of SB 2199* before Senate Rules Committee, 1997-98 Session. The California State Association of Counties (CSAC) documented that reports of abuse and neglect of adults rose more than 116% between 1984 and 1993. California Assembly on Public Safety, Committee Analysis of SB 2199. See also Nina Santo, *Breaking the Silence: Strategies for Combating Elder Abuse in California*, 31 McGeorge Law Review 801 (Spring 2000); Seymour Moskowitz, *Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect*, 36 Loyola Law Review 589 (Winter 2003).

Pending Legislation:

No similar legislation has been introduced to date.

Pending Litigation:

None Known.

Fiscal Impact:

No anticipated fiscal impact.

Likely support/opposition:

The State Bar of California Trusts and Estates will support this legislation. There is no known opposition.

Germaneness:

The State Bar's Trusts and Estates Section deals with estate and trust litigation and litigation involving elder abuse. The subject matter of the legislation comes within the scope of the interests and knowledge of the Trusts and Estates Section of the State Bar of California.

TEXT OF PROPOSAL:

SECTION 1. Section 15657.4 is added to the Welfare and Institutions Code, to read:
15657.4. (a) No claim for relief brought under EADACPA is subject to the provisions of a pre-dispute arbitration agreement unless the arbitration agreement:

- (1) provides for neutral arbitrators that are selected by agreement of the parties;
- (2) permits discovery under Code of Civil Procedure Section 2016.010 et seq;
- (3) requires a written award;
- (4) neither limits nor prohibits the type of damages recoverable; and
- (5) does not require elders to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.

(b) Nothing in this section would prevent the enforcement of an arbitration agreement which is entered into in writing after the alleged injury occurred.